NO. 92-855

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

JON HAROLD ROYAL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence assessed under the Federal Sentencing Guidelines *can exceed* the *statutory maximum Congress fixed* for the *acts alleged in the indictment.*

2. Whether the prior decision of this same Court of Appeals in *Bryan v. U.S.*, 17 F.2d 741 (5), that proof, over objection, of a third parties' effort to falsify evidence or conceal the truth to a defendant's advantage is prejudicial error absent proof that such third parties action was instigated by the defendant should be overruled and such proof, which occurred in this case, held to be proper.

3. Whether plea bargained accomplice testimony *alone, directly contradicted by a defendant's testimony,* can constitute such *overwhelming evidence* of guilt as to render harmless highly prejudicial proof that the defendant allegedly committed an extraneous murder.

4. Whether a *prosecutor, after indictment* can claim the Good Faith Exception when, *pending trial on said indictment, he,* with an affidavit *prepared and approved by him,* obtains a search warrant to procure evidence *in his upcoming trial.*

5. Whether an affidavit for a search warrant for cocaine that reveals on its face *no drug activity* by the defendant or in the residence in question *for one year and nine months prior* can be upheld solely by the Good Faith Exception Rule.

6. Whether Petitioner's trial counsel was so ineffective as to violate Petitioner's right to effective counsel guaranteed him by the Sixth Amendment to the Constitution of the United States.

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

The Petitioner, Jon Harold Royal, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on September 8, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, *U. S. v. Royal*, yet unreported, appears at Appendix A.

JURISDICTION

The judgment and opinion of the United States Court of Appeals, Fifth Circuit, (Appendix A) was rendered on September 8, 1992. Jurisdiction to review said judgment herein by writ of certiorari is conferred on this Court by 23 U.S.C.A. 1254(1).

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment IV:

> "No Warrants shall issue, but upon probable cause, . . ."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . ., and to have the Assistance of Counsel for his defense."

28 U.S.C. § 994(b)(1):

> "(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code."

21 U.S.C. § 841(a):

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. § 841(b)(1)(A)(ii)(II):

> "(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this secton involving — . . .
>
> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of — . . .
>
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;"

Federal Rules of Criminal Procedure, Rule 11(c):

> "(c) **Advice to Defendant**. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> "(1) . . . and the maximum possible penalty provided by law, . . ."

STATEMENT OF FACTS

The indictment herein alleged a conspiracy to possess *a quantity* of cocaine with intent to distribute same

between on or about May 1, 1985, and September 6, 1990. Appellant was arrested in 1985 and went to the penitentiary in 1986. The conspiracy the government sought to prove was that prior to going to the penitentiary Appellant agreed to put his friend Le Beouf in with a Florida cocaine source in exchange for Le Beouf paying him commissions while Appellant was in the penitentiary for any drugs acquired by Le Beouf from said source. The only evidence supporting this contention was the fact that some small scales and *less than one ounce of cocaine* was found in a house occupied by Appellant and two other persons in September of 1990, almost two years after Appellant was released from the penitentiary, and the testimony of three *plea bargained accomplice witnesses.* The material testimony was as follows:

Le Beouf claimed that from 1986 on he bought cocaine for himself apart from Appellant with an oral agreement that he would pay Appellant a commission for the cocaine he imported from the State of Florida. (R. 3, P. 191) Le Beouf claimed he gave Royal 500 grams after Royal was released from prison as part payment from such agreement (R. 3, P. 192), but admitted that on a prior debriefing by the government he was asked who all was in on his distribution of cocaine from Florida, that he named two men, but did not at that time claim he ever had any connection to Royal. (R. 3, P. 192) Le Beouf admitted that after his first debriefing in which he admitted lying and before his last debriefing when he decided he had to tell the whole truth, he found out that Appellant had had sexual relations with his wife. (R. 3, P. 193-195) Le Beouf admitted at his first debriefing by the government he lied by telling them that he was involved in the cocaine business only up until April 1986 (R. 3, P. 182, 184), that the government, through prosecutor Snyder, advised him that he could go to the penitentiary for life for his drug activities, but agreed that *he would not*

even be prosecuted if he testified against Appellant. (R. 3, P. 184-185) Le Beouf admitted that while Appellant was in prison they discussed that Appellant was going to go into the car business and Le Beouf told him that he would help Appellant obtain a floor plan when Appellant was out of the penitentiary (R. 3, P. 187), and that after Appellant got out of the penitentiary he, Le Beouf, collateralized a loan for Appellant in the car business by putting up a $14,000 CD to which he retained title himself. (R. 3, P. 188)

Huddleston, *Le Beouf's half brother,* testified that he heard Royal and Le Beouf talking after Royal was out of the penitentiary and that Royal *felt* that Le Beouf owed him compensation for giving him his drug source in Miami before he went to the penitentiary, but Le Beouf did not feel like he owed him anything. (R. 3, P. 212) Huddleston admitted that he visited Royal in prison and their discussion was just normal everyday talk and that he cannot remember whether or not Royal asked him about Le Beouf being still involved in the drug business. (R. 3, P. 220) Before Huddleston talked to the federal agents, Le Beouf talked to him and told him they were going to talk to them and also discussed with Le Beouf *what Le Beouf had told* the agents. Thereafter, the government entered in an agreement with him that *he would not be prosecuted at all in exchange for* his debriefing and *testifying against Appellant.* (R. 3, P. 225-227) In his debriefing, he was told that Le Beouf had made a false statement.

After Royal was arrested Husik never talked to Royal at any time about what was to happen while Royal was out of circulation for his arrest. (R. 3, P. 89-92) Husik testified against Royal under an agreement by the prosecutor that he would not be prosecuted for anything. (R. 3, P. 94) About all he said was that Appellant arranged to get him a vehicle before going to prison. (R. 3, P. 89-95)

Appellant testified that after his arrest in May of 1985 by DEA agents he continued to be a friend of Le Beouf but totally ceased any activity or connection with the drug business or drug transactions. (R. 5, P. 532-533, 537-538) He testified that the truck that was bought for Husik was arranged by him because his friend Le Beouf wanted it financed for Husik and Le Beouf was afraid because of the family relationship that Husik would not pay him back (R. 5, P. 536), and that he arranged for Husik to pay for the truck (R. 5, P. 537), and charged him interest on the loan (R. 5, P. 542), that his trip to Florida with Husik was simply to see his girlfriend Maria and Husik asked him to go with him for company (R. 5, P. 544-545, that he did nothing to cause the former source of cocaine, Carmen, to later sell to Husik or Le Beouf (R. 5, P. 546), that Husik paid probably around $8,000 on the truck and Le Beouf paid the balance off. (R. 5, P. 553) Appellant did not introduce Le Beouf to Carmen for the purpose of narcotic trafficking and never had any discussion with Le Beouf about engaging in the drug business and Appellant getting commissions (R. 5, P. 559), that Le Beouf visited him in prison in 1988 where they talked about sports and other casual matters, that he asked Le Beouf if he was still in the drug business and Le Beouf said no. (R. 5, P. 561) Appellant absolutely denied that Huddleston ever delivered any cocaine to him after his release from the penitentiary. (R. 5, P. 573) the scales and the white powder found when searching the home where Appellant resided with two other persons were all concealed from view. (R. 4, P. 323, 325) The cocaine found in said house was *less than one ounce.* (R. 4, P. 380)

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with an applicable decision of this Court and with the decision of other United States Court of Appeals decisions on the same matters.

Said conflicts are on a federal question that is critical to the sentencing of many defendants in the future, to the extent of a Federal Court's power to sentence under the guidelines in excess of the statutory maximum, to the right of every defendant in a criminal case to know what is the maximum penalty that may be assessed against him prior to deciding what plea to enter and to the validity of hundreds of prior guilty pleas in federal drug cases.

Appellant was sentenced to 30 years *under the Guidelines,* although the *statutory maximum* under the *allegations of the indictment* herein was 20 years.

In *Mistretta v. U.S.*, 109 S.Ct. 647, 656, 664, the Supreme Court stated as follows:

> "Congress instructed the commission that these *sentencing ranges* must be consistent with the pertinent provisions of Title 18 of the United States Code and *could not include sentences in excess of the statutory maxima*. . . . Given the consistent responsibility of federal judges to pronunce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of the judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling acts." (Emph. ours)

In other words the *quantity of drugs used to fix punishment under the Guidelines* is not limited by the quantity alleged in the indictment, but the sentence fixed by the Guidelines *cannot exceed* the *statutory maximum* Congress fixed for the *acts alleged in the indictment.* This same Court of Appeals, pre-guideline, in *Meyers v. U.S.*, 116 F.2d 601(5), *Packnett v. U.S.*, 503 F.2d 949(5), and *Theriault v. U.S.*, 434 F.2d 212(5), held that a *failure to allege in the indictment facts* constituting an aggravation of an alleged offense *that will increase the statutory punishment range, precludes the enhancement of the statutory range of punishment* of the alleged offense. The opinion below, in holding otherwise, decides the question solely on whether quantity is an element of the offense proscribed by 21 U.S.C. § 841(a), possession with the intent to distribute *some* quantity of cocaine. That is not the question here. Appellant agrees that quantity is not an element of the alleged offense under § 841(a). The question here is not whether quantity is an element of the offense under 21 U.S.C. § 841(a); the question is "what is the *statutory* maximum sentence fixed by Congress for violating § 841(a) *only. Appellant's position is simply that application of the sentencing Guidelines cannot extend a sentence beyond the maximum, possible penalty provided by Congress for the acts Appellant is alleged in the indictment to have committed.* The decisions in *U.S. v. Alvarez*, 735 F.2d 461(11), *U.S. v. Crockett*, 312 F.2d 622(10), and *U.S. v. Moore*, 540 F.2d 1088(DC), hold precisely this and are directly in conflict with the decision in this case. *In this case Appellant was assessed a sentence that was ten years beyond the statutory maximum.*

Rule 11(c)(1) mandatorily requires a Trial Judge, before accepting a plea of guilty or nolo contendere, to determine that the defendant understands the "*maximum possible penalty provided by law.*" *In addition thereto,* it

requires advising the defendant that the court will be required to consider any "applicable guidelines." Thus, it is manifest that "maximum penalty provided by law" is not considered a part of the guidelines. We respectfully pose the following question: if a defendant enters a guilty plea to an indictment merely alleging conspiracy to distribute cocaine, without any allegation as to amount, what would any member of this Honorable Court sitting as a trial Judge, advise a defendant to be the maximum possible sentence? Obviously, the advice would be and the advice that has been given in every past guilty plea to such allegation is that the maximum possible penalty is twenty (20) years. We submit that no Trial Judge in the hundreds of guilty pleas entered to this offense has ever advised the defendant that the maximum possible penalty for conspiracy to distribute *some* cocaine *only* was life imprisonment. A failure to accurately advise a defendant prior to accepting his guilty plea of the maximum statutory penalty for the acts he is charged by the indictment to have committed renders any such plea invalid. *Canal Zone v. Tobar*, 565 F.2d 1321. *U.S. v. Jaramillo-Suarez*, 857 F.2d 1368(9). Thus, if the panel opinion is correct, then virtually all pleas of guilty to an indictment alleging distribution of or a conspiracy to distribute cocaine, without alleging any amount, were invalid pleas. We pose one other question. If Rule 11(c)(1) does not refer to the maximum *statutory* penalty for *the acts the indictment alleges a defendant committed*, then, *how is it possible* for a trial judge to advise a defendant on a guilty plea as to the maximum penalty provided by *law* when, at that time, there has not yet been any determination or evidence as to the amount of dope a defendant might be chargeable with *under the guidelines.* As clearly shown in *Mistretta v. U.S., supra*, sentencing ranges fixed by the sentencing Guidelines cannot exceed the *statutory* maximum *fixed by Congress for* a defendant's commission of the *acts alleged in the Grand Jury Indictment.*

In the only two cases cited in the body of the opinion below, *U.S. v. Lokey*, 945 F.2d 825, 856(5), and *U.S. v. Morgan*, 835 F.2d 79, 81(5) the indictments alleged the amount exceeded 100 kilograms, but the sentence did not exceed the statutory maximum for a 21 U.S.C. § 841(a) offense. Obviously since quantity is not an element of § 841(a) the failure to *prove* the allegation that the quantity exceeded 100 kilograms was immaterial as long as the sentence did not exceed the statutory maximum of § 841(a). The panel opinion in its footnote cites *U.S. v. McHugh*, 769 F.2d 860, 868(1), *U.S. v. Campuzano*, 905 F.2d 677, 679(2), and *U.S. v. Gibbs*, 813 F.2d 596, 599-601(3). In *McHugh, supra*, the court held "*proving* the *amount* of marijuana *is an essential element* of the offense *only under* 21 U.S.C. §841*(b)(6)*." In *Campuzano, supra*, the indictment actually alleged the quantity to be in *excess of 5 kilograms* and the sentence was *within the* maximum *statutory range* for § 841(a). In *Gibbs, supra*, the majority held that the *indictment alleged the excessive quantity* sufficiently to raise the statutory maximum to that of § 841(b)(6), but the dissent held that the allegation of quantity in the indictment was not clear enough.

II.

The decision below conflicts with another decision of the same Court below on the same matter without overruling said prior decision and has decided important questions of federal law, which have not been, but should be, settled by this Court for the reason that the decision below, if permitted to stand, is certain to result in a gross violation of many defendant's rights in future criminal cases throughout the United States.

A. In *Bryan v. U.S.*, 17 F.2d 741(5), this same United States Court of Appeals expressly held that proof of a third party's effort to conceal the truth or falsify evidence to the

defendant's advantage is prejudicial error, *unless there is proof that such conduct of a third party was instigated by the defendant.* This Court in *Bryan, supra,* held:

> "[1] We are of opinion that the ruling complained of constitutes prejudicial error. Ison's conversation with Mrs. Sherban tended strongly to show that he made an attempt to conceal evidence that plaintiff in error was the owner of the E-301. That attempt could not be attributed to plaintiff in error, in the absence of proof that it was made by his authority, or with his knowledge or consent. . . . It cannot be contended that the evidence was offered against Ison, because he was not on trial. . . . The jury might well have concluded that plaintiff in error's wife telephoned of her own volition, and without his knowledge or consent, but that, in order to conceal evidence of his guilt, plaintiff in error authorized and requested his brother-in-law, Ison, to go from Galveston to Houston for a personal interview with Mrs. Sherban. . . . The judgment is reversed, and the cause remanded for a new trial."

Said *Bryan, supra,* decision and said principles announced therein were affirmed by the United States Supreme Court in *Krulewitch v. U.S.,* 69 S.Ct. 717. Other decisions *expressly pronouncing* the same principle are *Hodges v. State,* 299 S.W. 907, *Nadar v. State,* 219 S.W. 474, and *Suggs v. State,* 79 S.W. 307.

Notwithstanding the prior unequivocal declaration of the Court below in *Bryan, supra,* the decision below held that the overruling of Appellant's objection to proof that Appellant's former girlfriend suggested to her son, witness Tippit, that he should falsely say some guns and a small amount of cocaine found in the house, occupied by said girlfriend, Tippit, and Appellant, belonged to Tippit was

proper. The decision below fails to mention the same Court's prior holding in *Bryan v. U.S., supra*, though it was cited in Appellant's Brief, but conflicts with said case by stating the following:

> "Although Royal evidently believes that this evidence caused the jury to unfairly discredit Tippit's testimony on Royal's behalf, we think it just as likely that Tippit's refusal to perjure himself despite pressure from his mother may have leant more credibility to his testimony. In any case, the evidence was clearly relevant to the jury's evaluation of Tippit's credibility and his possible bias. *See United States v. Bratton*, 875 F.2d 439, . . ."

It is thus obvious that the Court below totally missed the point in the *Bryan v. U.S., supra*, case. The prejudice in proof that a third party attempted to conceal evidence or procure false testimony to a Defendant's advantage *does not lie* in its effect *on the credibility of the person sought to be suborned* but lies in the patent inference that the Defendant was behind such attempted subornation and therefore must be guilty of the alleged offense. The only case cited by the panel opinion on said point, *U.S. v. Bratton*, 875 F.2d 439, was a case where *the Defendant himself* had physically abused a person testifying in his behalf and did not have any remote relation to the question in *Bryan v. U.S., supra*, and in this case. (R. 5, P. 648-661) Actually, the testimony of Tippit was of no significance either for or against the Defendant. However, proof that Defendant's girlfriend had attempted to get a young man to suborn perjury relative to material facts of the case eliminated any possibility of a fair trial, and, if permitted to stand, will result in a like denial of a fair trial to many other defendants in the future.

B. The opinion of the United States Court of Appeals

below, in admitting that in overruling a motion in limine and admitting in evidence proof that at a time *prior to the alleged conspiracy* Appellant sold some known bad dope to Geno Hernandez and that *such resulted in his death* was error, stated the following:

> "We are sympathetic to Royal's argument that the evidence of Hernandez's death was *improperly admitted*. . . .this evidence was *completely unnecessary to the government's case and we discern no purpose other than prosecutorial overkill* in the *government's insistence* that it be admitted." (Emph. ours)

The opinion thereafter holds that this flagrantly inflammatory, and prejudicial evidence did not harm Appellant *because there was overwhelming proof of his guilt* of the alleged conspiracy.

Thus, a new unheard of question is squarely presented to this Court—*can accomplice testimony alone, under a plea bargain that the accomplice will not be prosecuted for any offense, when the defendant has taken the stand and directly contradicted all of said accomplice testimony, constitute such overwhelming evidence of guilt as to render immaterial admission of admittedly improper evidence that a man dies as the result of the defendant selling him known bad dope? The answer to this question is apparent from the statement in U.S. v. Hinds*, 772 F.2d 362, to-wit:

> "The policy behind the giving of an accomplice instruction is "no more than a common sense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity." *Cool v. United States*, 409 U.S. 100, 103, 93 S.Ct. 354, 357, 34 L.Ed.2d 335

> (1972). The accomplice is thought to have a "motive to lie" since he is in a position to extricate himself by incriminating his partner in crime. Moreover, the possibility of leniency in plea agreements and sentencing renders an accomplice's testimony one to be considered with great care and caution."

U.S. v. Hinds, 772 F.2d 362.

The sole question of this defendant's guilt is whether he made an oral agreement with Le Beouf that while Appellant was in the penitentiary Le Beouf would carry on a drug operation from which Appellant would be entitled to commissions. Appellant vigorously denied any such agreement and all of the incriminating allegations relating thereto. Le Beouf admitted that he never made any payment to Appellant for any drugs he sold during Appellant's incarceration, that the government agreed to forgo any prosecution of him whatsoever in exchange for his testimony against Appellant, that on his first debriefing by the government he admitted many many large cocaine transactions with numerous people, but never claimed Appellant agreed to be in on any drug operation to be conducted after Appellant went to the penitentiary, that he lied during his first debriefing seeking immunity in several respects and that he incriminated Appellant only on his last debriefing, after he discovered Appellant had sex with his wife.

If proof of any irrelevant extraneous crime that is certain to create inflamed passion against a defendant can be excused on a theory of "an overwhelming preponderance of evidence of guilt", when the only evidence is plea bargained accomplice testimony, then, a right to a fair trial is extinct in our country.

C. In *U.S. v. Freeman*, 685 F.2d 951(5) this same Court of Appeals held that an affidavit for a search warrant to

search a residence for items *such as drug paraphernalia is stale* where no drug activity was shown to have been ongoing at any time during the *preceeding six months.* The affidavit for the search warrant of Appellant's residence *affirmatively showed the last known drug activity by Appellant to have been one year and nine months before* presentation of the said affidavit to the magistrate. The opinion below avoided consideration of said Fourth Amendment violation by use of the Good Faith Exception. The undisputed evidence was that the affidavit was presented *after* the defendant was indicted on this case and awaiting trial and that the affidavit was a product of and reviewed by the Assistant United States Attorney Steven L. Snyder, who was then preparing the case for trial. The questions here are (1) Whether *a prosecutor, after indictment,* can claim the Good Faith Exception when, *pending a trial on said indictment, he* obtains a search warrant *to procure evidence in his upcoming trial,* and (2) Whether an affidavit for a search warrant for drug paraphernalia that reveals *on its face no drug activity* by the defendant or in the residence in question *for one year and nine months prior* can be upheld on the Good Faith Exception? Said *U.S. v. Freeman, supra,* holds that even though a search warrant for IRS material and drug paraphernalia may not be *stale* as to the IRS material, it is *severable* and will be *stale* as to the drug paraphernalia *if it is specifically referred to* in the affidavit for the warrant and the affidavit fails to show any drug activity in the residence in excess of six months. The *Freeman* case further holds that the "plain view doctrine" cannot save the drug paraphernalia from exclusion, because having specifically referred to an item, it must be presumed that a specific search was conducted therefor.

D. As to the constitutional requirement of effective counsel there is no distinction between court-appointed and hired counsel *Cuyler v. Sullivan,* 100 S.Ct. 1708, and the stand-

ard of competence rquired is as high in a non-capital as in a capital case *Skillern v. Estelle,* 720 F.2d 829(5th). In determining whether counsel's performance met the rquirement of constitutionally effective counsel the question is whether his performance was "within the range of competence demanded of attorneys in criminal cases" *McMahon v. Richardson,* 90 S.Ct. 1448, 1449. As to this question the record must show that counsel's representation fell below an objective standard of reasonableness *Strickland v. Washington,* 104 S.Ct. 2052, 2064. For reversal to ensue as a result of such ineffectiveness the record must show that there is "reasonable probability", which is a probability sufficient to undermine confidence in the outcome, but for counsels unprofessional errors, the result of the proceeding would have been different *Strickland v. Washington, supra.*

Trial counsel failed to move for a mistrial for or object to proof by the government that Appellant was guilty of "*loan sharking*" prior to his arrest on May 25, 1985, (R. 5, P. 611-613) and that such "loan sharking" was *a felony* offense (R. 5, P. 635), which was highly prejudicial proof of a crime and acts condemned even by the Bible, and which has no relevancy or probative value as to the offense of which Appellant was on trial. The Bible itself condemns usury in three separate instances, Exodus 22:25, Ezekiel 22:12 and Deuteronomy 23:19. Surely, no one would contend that to permit proof a Defendant committed a wholly unrelated crime and sin condemned by law and the Bible could be defense strategy. Trial counsel further failed to move for a mistrial for or object to proof that Appellant's possession of his two shot guns and rifle *was a felony* (R. 5, P. 637). Furthermore, without making any objection thereto, Trial Counsel permitted the government to prove that in 1977, approximately *thirteen years before the return of the Indictment herein,* Appellant engaged in *the business of selling quaaludes and methamphetamines*

(R. 3, P. 142-144). This same Court of Appeals has held similar proof highly prejudicial error, *U.S. v. Sardelli,* 813 S.W.2d 654(5th), *U.S. v. Enzor,* 820 F.2d 684(5th). Would anyone contend that proof of any of the above patently, highly prejudicial facts, each of which would most surely deprive a defendant of a fair trial, was acquiesced in by defense counsel to somehow endear the defendant to the jury? Said neglect was obviously not strategy, but was flagrant incompetence.

The Superseding Indictment simply alleged that Appellant and *other persons to the grand jury known* and unknown conspired to possess a quantity of cocaine. (R. 1, P. 43-44) Thus, the *prosecutor was given a blank check* to prove up *any agreement* by Appellant with *any person* to commit the alleged offense *on any occasion within the period of the statute of limitations. Competent* counsel would have had to have known that the *court's charge would* follow the indictment and likely also *constitute a blank check to the jury* to convict Appellant of a conspiracy as to any cocaine transaction had by Appellant within the five years of his Indictment, regardless if it was the same transaction upon which the grand jury returned the Indictment. Notwithstanding these certain baleful consequences, Appellant's counsel failed to move to dismiss the Indictment for uncertainty or move for a bill of particulars as to whom was intended to be the conspirators *known to the grand jury.* Why not? There is no possibility that such could have been trial strategy. As is discussed in *Krulewitch v. U.S.* 69 S.Ct. 716, the procedures in charging and proving conspiracy offenses certainly should not be expanded, but, if anything, should be rigidly and narrowly enforced by reason of the inherent dangers in the offense itself. This blank check given by the indictment to the prosecutor as to proof, and the further blank check which must inevitably follow such indictment into the court's charge,

violates in all respects the principles pronounced by the Supreme court in *Russell v. U.S.*, 82 S.Ct. 1038, wherein the court held as follows:

> "It is argued that any deficiency in the indictment is these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment. . . .
>
> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. . . .
>
> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. . . .
>
> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. *It enables his conviction to rest on one point and the affirmance of the conviction to rest on another.* It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." (Emph. ours)

There is no possible way to know from the indictment herein whom the grand jury intended to charge Appellant with entering into a conspiracy. Under the Court's charge, there is no way to tell *which of the numerous drug transactions*, which might have been deemed a conspiracy by the jury, was actually found to have been proved beyond a

reasonable doubt. The jury could reasonabaly conclude that evidence would not be admitted into evidence against Appellant unless it could be considered as proving the allegation in the indictment.

We have found no decisions where an indictment alleded that conspirators are known to the grand jury, yet their names were not alleged either in the body of the alleged offense or in the overt acts, and demand was made for said names by motion to dismiss and for a bill of particulars. However, the following quotations from the following decisions, at least, implies that, in such event, such is necessary:

> "Of course, *at least two persons* are required to constitute a conspiracy but the *identity of the other members of the conspiracy is not needed.*" *Rogers v. U.S.* 71 S.Ct. 438. (Emph. ours)

> "The evidence fails to show any other person, to the grand jury unknown, who could take Freiburger's place and supply the necessary second party to the conspiracy.
>
> The only other person who could possibly have been a party to the conspiracy was one Meyers. He was, however, to the grand jury known. *Worthington v. U. S.*, 64 F.2d 939.

Though the evidence shows cocaine transactions, involving Appellant between 1982 and 1990, each of which the jury might have found to constitute a conspiracy between him and the other person involved, trial counsel failed to object to the failure of the court's charge to instruct the jury that it must be unanimous as to one particular conspiracy. This court has recently held in *U.S. v. Holley*, 942 F.2d 916, that it is reversible error to fail to give such in-

struction when the charge permitted conviction on more than one set of facts. In a case of such multiple conspiracies, such failure has been held to constitute *plain error. U.S. v. Jerome*, 942 F.2d 1238(9th), *U.S. v. Gilley*, 836 F.2d 1206(9th), *U.S. v. Mastellotto*, 717 F.2d 1238(9th).

The evidence raised separate conspiracies in 1983, 1984 and 1985 which are barred by the statute of limitations but trial counsel failed to object to the failure of the court's charge to limit the right to convict to a conspiracy entered into within the period not barred by the statute of limitations. The evidence conclusively showed that Appellant admitted to numerous drug transactions involving himself and others in 1983, 1984 and 1985. An ordinary jury would have been virtually compelled to find the Appellant guilty without such limiting instruction in the court's charge. Failure to request a limiting instruction, where it was not one-hundredth as harmful to a Defendant as here, has been held to constitute ineffective counsel. *Lyons v. McCotter*, 770 F.2d 529 (5th). There can be no rational argument that this neglect was a form of trial strategy.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and Petitioner accordingly so prays.

Respectfully submitted:

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ATTORNEY FOR PETITIONER

CERTIFICATE

I hereby certify that three copies of the foregoing petition for Writ of Certiorari have been duly mailed to counsel for the United States of America, Sean Connelly, U.S. Department of Justice, Room 2720, Washington, D.C. 20530, this 12th day of November, 1992.

/s/ W.V. Dunnam, Jr.

W. V. DUNNAM, JR.

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Jon Harold ROYAL,
Defendant-Appellant.

No. 91-8471.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1992.

Defendant was convicted in the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., of conspiracy to possess cocaine with intent to distribute. Defendant appealed. The Court of Appeals, Duhe', Circuit Judge, held that: (1) defense witness' testimony that his mother tried to convince him to testify that guns and drugs in defendant's house belonged to witness was admissible over defendant's hearsay objection; (2) evidence of defendant's arrest and imprisonment and cocaine sales to person who subsequently became coconspirator were admissible; and (3) quantity of cocaine did not need to be alleged in indictment in order to notify defendant of quantity relevant to sentencing.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM and DUHE', Circuit Judges and HARMON, District Judge.[1]

DUHE', Circuit Judge.

Defendant Jon Harold Royal appeals both his conviction of conspiracy to possess cocaine with intent to distribute it and his sentence. We affirm both.

I.

Royal met David LeBoeuf in 1977 and sometime thereafter they began trafficking methamphetamine together in the Houston area. By 1983, the two were trafficking cocaine, with Royal supplying the drug to LeBoeuf for resale. In 1985, Royal was arrested for selling cocaine to an undercover agent. He pled guilty to federal drug charges and was imprisoned upon his guilty plea in April 1986. While imprisoned, Royal enlisted LeBoeuf and others to carry on his drug operations for him.

The jury had before it the following evidence supporting the charge that Royal conspired to perpetuate his cocaine business while imprisoned. After his arrest in 1985, he asked LeBoeuf to assist in transporting cocaine from Florida to Texas. LeBoeuf and his brother-in-law, Jay Husik, met Royal and agreed that Husik would be paid $2500 per trip. Husik had previously transported cocaine between Austin and Houston for LeBoeuf. Royal arranged and provided the money for the purchase of a truck for

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[1] District Judge of the Southern District of Texas, sitting by designation.

Husik and he accompanied Husik on one trip to Florida. Husik made five to ten trips, returning each time with two to six kilograms of cocaine. Of each such delivery, LeBoeuf received one kilogram and Royal the rest.

Shortly before Royal was imprisoned, he arranged for LeBoeuf to assume his role in this trafficking scheme. He accompanied LeBoeuf to Florida and introduced LeBoeuf to his supplier. LeBoeuf agreed to pay the Defendant a commission for the cocaine bought in Florida during his imprisonment.

At the time these arrangements were made, the Defendant thought he would be in prison for six to eight months. Actually, he was imprisoned for almost three years. After his release, LeBoeuf refused to pay him the promised commissions because, according to LeBoeuf, the bottom had fallen out of the cocaine market during the Defendant's longer-than-expected prison term. To settle their dispute, LeBoeuf arranged for a loan for Royal's used car business and agreed to provide him with 500 grams of cocaine.

After federal authorities began investigating LeBoeuf's activities, LeBoeuf, Husik and others agreed to cooperate with these investigators, who arrested the Florida suppliers and got a warrant for the Defendant's arrest. These agents also obtained a warrant to search the Defendant's house, where they found cocaine, scales, business records and guns. Subsequently, Royal was convicted of conspiracy to possess cocaine with intent to distribute it. He was sentenced to thirty years' imprisonment, ten years' supervised release, a $25,000 fine and a $50 special assessment. He now appeals both his conviction and his sentence.

II.

[1] Royal contends that the district court erred in several evidentiary rulings. We examine a district court's ruling on the admissibility of evidence for abuse of discretion. *United States v. Shaw*, 920 F.2d 1225, 1229 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2038, 114 L.Ed.2d 122 (1991).

A.

[2] First, Royal complains of the denial of his motion to exclude evidence that a customer of his, Geno Hernandez, died in 1986 as a result of using cocaine Royal supplied. During cross-examination, he denied that he was Hernandez's supplier at that time. A government rebuttal witness testified that the Defendant supplied the cocaine to LeBoeuf, who was unable to sell it as planned because there was something wrong with it, and that LeBoeuf then gave it to Hernandez. The government argues that this evidence is relevant to the conspiracy charge because royal initially intended for Herandez to take over his cocaine business and chose LeBoeuf for this position only after Hernandez died. This evidence is also relevant, the government contends, to impeach the Defendant's testimony that he had discontinued all drug trafficking activities by the time Hernandez died.

We are sympathetic to Royal's argument that the evidence of Hernandez's death was improperly admitted. The government could have offered evidence that the Defendant supplied cocaine to Hernandez in 1986 and intended to pass on his drug business to Hernandez to establish the details of the conspiracy and the time frame in which his drug activities occurred without also offering evidence that Hernandez's death resulted from "bad" co-

caine that originated with Royal. In light of the other evidence against the Defendant, this evidence was completely unnecessary to the government's case and we discern no purpose other than prosecutorial overkill in the government's insistence that it be admitted.

Nonetheless, Royal has not demonstrated that the admission of this evidence prejudiced him in any way. The evidence of his involvement in the cocaine conspiracy was overwhelming, supported by the testimony of LeBoeuf, Husik, and LeBoeuf's brother, who also transported drugs for LeBoeuf, as well as by the physical evidence found in Royal's home. He has not convinced us that the jury convicted him to punish him for Hernandez's death, rather than for the drug conspiracy offense with which he was charged. Accordingly, the admission of this evidence, if error at all, was harmless. *United States v. Williams*, 957 F.2d 1238, 1243 (5th Cir.1992) (finding erroneous admission of drug courier profile as substantive evidence of defendant's guilt to be harmless error where evidence of guilt was overwhelming).

B.

[3] Next, Royal argues that the court erred in allowing the testimony by Kalim Tippit that Tippit's mother[2] tried to convince him to testify that the guns and drugs found in the house belonged to him and not to Royal. The defendant objected on hearsay grounds and now argues that such evidence is admissible only if he, as the defendant, and not a third party, tried to influence the witness's testimony.

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[2] Tippit's mother was the Defendant's girlfriend. Tippit, his mother and the Defendant shared a house at the time of the Defendant's arrest.

We cannot agree. Tippit was a defense witness and the government was entitled to elicit during cross-examination testimony relevant to any possible bias he may have had. *United States v. Abel*, 469 U.S. 45, 51, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984) (holding that the Federal Rules of Evidence permit impeachment of a witness showing bias). Although Tippit did not comply with his mother's request, the influence his mother tried to assert on his testimony was certainly relevant to show that his testimony may have been biased. The jury was entitled to hear this evidence so that it could evaluate his credibility. Although Royal evidently believes that this evidence caused the jury to unfairly discredit Tippit's testimony on Royal's behalf, we think it just as likely that Tippit's refusal to perjure himself despite pressure from his mother may have leant more credibility to his testimony. In any case, the evidence was clearly relevant to the jury's evaluation of Tippit's credibility and his possible bias. *See United States v. Bratton*, 875, F.2d 439, 443 (5th Cir.1989) (finding no abuse of discretion where court allowed evidence that defendant had physically abused wife to show that her testimony on his behalf may have been motivated by fear).

C.

[4] Royal asserts that evidence found in his home pursuant to a search warrant was unlawfully admitted because the warrant was supported by stale evidence and therefore failed to show probable cause. The warrant was based on a twelve-page affidavit by Special IRS Agent Gary Gallman and described conduct by the Defendant occurring over the several years prior to the issuance of the warrant.[3] A

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[3] The affidavit recited details of Royal's involvement with drug trafficking since the early 1980s. It also described his continuing involvement with his co-conspirators, including his receipt of cocaine as partial payment for the commissions LeBoeuf "owed" him, after his release

United States magistrate issued the warrant, and the district court determined that the magistrate's finding of probable cause was reasonable, rejected the argument that the evidence was stale, and, in any case, concluded that the "good faith exception" under *United States v. Leon*, 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21, 82 L.Ed.2d 677 (1984), applied to this case.

[5] We need not address probable cause for the warrant because we conclude that law enforcement officials acted in good failth in relying on the warrant. *United States v. Puma*, 937 F.2d 151, 158 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1165, 117 L.Ed.2d 412 (1992). Evidence obtained under a warrant, even one based upon inadequate probable cause, is admissible if an officer's reliance on the warrant was objectively reasonable. *Id.* "Such reliance is objectively reasonable unless the affidavit supporting the warrant is so lacking in indicia of probable cause as to render belief in its existence unreasonable." *Id.* Furthermore, the "[i]ssuance of a warrant by a magistrate normally suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant to a warrant." *United States v. Craig*, 861 F.2d 818, 821 (5th Cir.1988). Accordingly, we find no reason to reverse the district court.

D.

[6] Next, Royal complains of the admission of evidence of several prior bad acts. The government offered evidence that he sold LeBoeuf cocaine on numerous occasions during 1983 and 1984, and was arrested in 1985 and imprisoned in 1986 for several sales of cocaine to an under-

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Footnote 3 continued.

from prison in 1988. The warrant issued on September 5, 1990.

cover drug agent in 1983. Royal argues that the government admitted evidence of these prior bad acts to prove character in contravention of Rule 404(b),[4] that the cocaine sales to LeBoeuf were so remote in time that the jury may have convicted him for acts which were barred by the statute of limitations, and that in any case the court should have excluded this evidence under Rule 403[5] because of the likelihood of unfair prejudice.

The government argues that Rule 404(b) should not operate as an evidentiary bar because the evidence was not extrinsic evidence admitted to prove character. Rather, it was evidence essential to proving that the Defendant had engaged in the conduct constituting the offense charged. The government contends that his imprisonment in 1986 and his relationship prior to that time with LeBoeuf was critical background informnation necessary to understand the charged conspiracy.

[7] Evidence that is "inextricably intertwined" with the evidence used to prove a crime charged is not "extrinsic" evidence under Rule 404(b). *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989). Such evidence is considered "intrinsic" and is admissible "so that the jury may

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[4] Fed.R.Evid. 404(b) provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. If may, however, be admissible for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident."

[5] Fed.R.Evid. 403 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

evaluate all the circumstances under which the defendant acted." *Id. See also United States v. Williams,* 900 F.2d 823, 825 (5th Cir.1990) (" 'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged.") (citing *United States v. Torres,* 685 F.2d 921, 924 (5th Cir.1981)).

The evidence of Royal's arrests and imprisonment was inextricably intertwined with the crime of which he as charged—namely, that he consipired with LeBoeuf for LeBoeuf to take over his drug business while he was in prison. The government could not have proven its case without establishing that the Defendant had an ongoing drug business at the time he entered prison. Accordingly, we find no abuse of discretion in the admission of this evidence, especially in light of the court's cautionary instruction.[6]

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[6] The district court made the following relevant limiting instructions:

> You have been told that the Defendant was found guilty in 1985 of distribution of cocaine. This conviction and other matters which might be considered by you as acts similar to those charged in the indictment have been brought to your attention because you may wish to consider them when you decide, as with any witness, how much of the Defendant's testimony you will believe in this trial. The fact that the Defendant was previously found guilty of another crime or has committed similar acts does not mean that the Defendant committed the crime for which he is on trial, and you must not use this prior conviction as proof of the crime charged in this case. You may consider such conviction for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, indentify, or absence of mistake or accident. Rec. Vol. V. p. 718. You are here to decide whether the government has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is not on trial for any act, conduct or offense not alleged in the indictment. Rec. Vol. V. p. 720.

[8] Similarly, we find no error in the admission of the evidence relating the 1983 and 1984 cocaine sales to LeBoeuf. In *United States v. Stovall*, 825 F.2d 817, 825 (5th Cir.1987), *as amended*, 833 F.2d 526 (1987), we examined a credit association fraud scheme. One of the defendants had been convicted of improperly receiving benefits from a loan and he complained that evidence allowed by the district court pertaining to the relationship between himself and another defendant in connection with that loan constituted extrinsic evidence of prior bad conduct. We held that "[s]ince the evidence admitted by the district court detained the full relationship between [the parties] and established that [the appellant] did receive an immediate financial benefit, ... it was a legitimate and necessary part of the government's case." *Id.*

In this case, the evidence pertaining to the Defendant's relationship with LeBoeuf, particularly as it involved prior drug transactions, was relevant to the crime charged in that it allowed the jury to understand the nature of the relationship between the two and evaluate whether it was likely that the Defendant would have conspired with LeBoeuf as charged. Especially in view of the limiting instructions, the admission of this evidence was not an abuse of discretioin.

[9] Finally, the admission of these prior acts did not violate Rule 403. The balancing of probative value against prejudidial effect required under this rule is within the discretion of the trial judge, and we reverse such determinations only if we find an abuse of the court's descretion. *United States v. Maceo*, 947 F.2d 1191, 1199 (5th Cir.1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1510, 117 L.Ed.2d 647 (1992). Finding none, we affirm. *See also United States v. Harris*, 932 F.2d 1529, 1534 (5th Cir.) (finding proof of prior drug activities more probative than prejudicial), *cert.*

denied, ____ U.S. ____, 112 S.Ct. 270, 116 L.Ed.2d 223 (1991); *United States v. Stephenson*, 887 F.2d 57, 59 (5th Cir. 1989) (same), *cert. denied*, 493 U.S. 1086, 110 S.Ct. 1151, 107 L.Ed.2d 1054 (1990).

E.

The remaining evidentiary point of error merits only the briefest discussion. Royal complains of the admission of evidence that his attorney made a false representation to the court.[7] He argues that this unfairly prejudiced him before the jury. Our review of the record reveals that the single on-the-record discussion of this issue occurred out of the presence of the jury. The court sustained Royal's objection to its admission. Hence, he has nothing of which to complain.

III.

[10] Next, Royal makes two arguments that the district court committed plain error with respect to the jury instructions. First, he attacks the court's failure to give a unanimity instruction in connection with its multiple conspiracies instruction.[8] He argues that because the jury heard evidence supporting multiple conspiracies, the

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[7] Allegedly, defense counsel falsely represented to the court at a bond hearing that Royal's parole officer knew Royal was in possession of the guns seized from the house, a violation of a term of the Defendant's parole, and that the officer had given him permission to possess the guns.

[8] The court instructed the jury as follows:

If you believe that the evidence has shown the existence of multiple conspiracies, you may not find the Defendant guilty unless you find beyond a reasonable doubt that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

court's failure to instruct the jury that it must unanimously agree that he had participated in one particular conspiracy was plain error. We disagree. The court's multiple conspiracy instruction reflects that the Defendant was charged in the indictment with one conspiracy. The court's instruction told the jury to convict Royal only if each juror believed beyond a reasonable doubt that he had participated in that conspiracy. Accordingly, there was no error in the court's failure to offer a special unanimity instruction, let alone plain error. *See also, United States v. Richerson*, 833 F.2d 1147, 1155-56 (5th Cir.1987) (finding no plain error where court failed to give even a multiple conspiracies instruction).

[11] Second, Royal contends that the court's instructions may have allowed the jury to convict him based upon conduct barred by the statute of limmitations. Although the indictment charged him with conduct occurring between May 1, 1985 and April 1, 1990, the court admitted relevant evidence of his conduct occurring prior to this period. The court instructed the jury as follows:

> You will note that the indictment charges that the offense was committed on or about specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date *reasonably near* the date stated in the indictment. (Emphasis added.)

While the underlined language may be ambiguous, the facts of the case eliminate the possibility that the jury could have convicted the Defendant for acts barred by the statute of limitations. The government admitted facts supporting the charge in the superseding indictment that Royal conspired with others to perpetuate his cocaine

business during the period of his imprisonment. This conspiracy involved an agreement which necessarily must have occurred *after* the Defendant was arrested and knew that he would be going to prison. He was arrested on May 22, 1985, and so any agreement must have been reached at some point thereafter. The court's failure to narrow the dates for the jury was not plain error.

IV.

[12] Royal challenges his sentence, contending that the district court unlawfully enhanced it. He was indicted under and convicted of violating 21 U.S.C. § 846, which provides that persons convicted of conspiracies involving controlled substances "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy." The object of the conspiracy for which Royal was convicted was possession with intent to distribute cocaine, a violation of 21 U.S.C. § 841.[9] He was therefore subject of that provision. Under § 841(b), three penalty ranges, based upon the amount of cocaine involved, apply to this offense: 1) ten years to life if five kilograms or more of cocaine were involved; 2) five to forty years if five hundred grams of cocaine or more were involved; and 3) zero to twenty years for all other cocaine offenses (except those involving death, serious bodily injury or repeat offenders).

The proof at sentencing established that the Defendant conspired to traffick in more than five kilograms of co-

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[9] Specifically, royal was convicted of conspiring to violate 21 U.S.C. § 841(a), which makes it "unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

caine. His sentence, thirty years' imprisonment with ten years' supervised release, falls within the range provided by the statute for that amount, ten years to life. He argues that, because the superseding indictment failed to allege the quantity of cocaine involved, his maximum appropriate sentence was twenty years. He contends that sentencing him within the higher sentence range based upon the quantity involved when the indictment did not allege such quantity constitutes an enhancement of his sentence.

Royal argues that for the government to seek an enhanced sentence under § 841(b), the quantity of drugs triggering that enhancement must be alleged in the indictment. Any other notice, he contends, is constitutionally deficient.[10] The superseding indictment in this case made no mention of a specific quantity of cocaine. The Defendant received notice that the government intended to seek a sentence based upon quantity when the government filed a "Penalty Enhancement Information" several days after the jury returned its guilty verdict and three months before his sentencing. In addition, the Presentence Report notified him that the quantity of cocaine would be relevant in determining his sentence. At the sentencing hearing, the government presented two witnesses who testified about the amount of cocaine involved and he had opportunity to present controverting evidence.

The circuit is part of an overwhelming majority of

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[10] Royal does not challenge the standard of proof applicable to sentencing factors, conceding that quantity need not be proven beyond a reasonable doubt. *See McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Furthermore, he evidently does not dispute that the court was entitled to find, from the evidence produced at sentencing, that his conduct constituting the offenses of which he was convicted involved more than five kilograms of cocaine. In fact, the evidence established that ninety-five to one hundred kilograms of cocaine were involved.

courts which have concluded that quantity is not an element of the offenses proscribed by § 841(a). *See United States v. Likey*, 945 F.2d 825, 836 (5th Cir.1991) (quoting *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir.1987).[11] Rather, quantity is relevant only at sentencing under § 841(b). *Id.* Royal does not allege that the indictment did not adequately notify him of the charges against him. because quantity is not an element of the offense of which he was convicted, he was not entitled to be notified through the indictment that quantity would be relevant to his sentencing. The notice he received that the court would take quantity into account when sentencing him was sufficient to allow him to present evidence, if any, disputing the government's evidence concerning quantity. Accordingly, we affirm his sentence.

V.

Finally, Royal argues that he received ineffective assistance of counsel during his trial. To succeed, he must prove that 1) his counsel's performance was deficient and 2) this deficient performance prejudiced the case. *Strickland v. Washington*, 466 U.s. 668, 104 S.Ct. 2052, 80

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[11] See also the following cases holding that quantity is not an element under § 841(a): *United States v. McHugh*, 769 F.2d 860, 868 (1st Cir.1985); *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 363, 112 L.Ed.2d 326 (1990); *United States v. Gibbs*, 813 F.2d 596, 599-601 (3d Cir.), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989), *cert. denied*, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1049 (1990); *United States v. Levy*, 955 F.2d 1098, 1106 (7th Cir.1992), *petition for cert. filed*, , ___ U.S.L.W. ___ (U.S. Apr. 1, 1992); *United States v. Wood*, 834 F.2d 1382, 1388 (8th Cir.1987); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1186, 117 L.E.2d 428 (1992); *United States v. Cross*, 916 F.2d 622, 623 (11th Cir.1990), *cert denied*, ___ U.S. ___, 111S.Ct. 1331, 113 L.Ed.2d 263 (1991); and *United States v. Patrick*, 959 F.2d 991, 995 n. 5 (D.C.Cir.1992).

L.Ed.2d 674 (1984); *Wilkerson v. Collins*, 950 F.2d 1054, 1063-64 (5th Cir.1992), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Mar. 18, 1992). We presume that counsel's performance falls within "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. To establish prejudice, Royal must demonstrate a reasonable probability that the result of his trial would have been different but for his counsel's errors. *Id.* at 694, 104 S.C.t., at 2068.

[13] First, he argues that his attorney failed to move to dismiss the indictment for uncertainty or to move for a bill of particulars. He has not established that his counsel's error, if it be such, prejudiced his case. In *Morlett v. Lynaugh*, 851 F.2d 1521 (5th Cir.1988), *cert. denied*, 489 U.S. 1086, 109 S.Ct. 1546, 103 L.Ed.2d 850 (1989), the defendant made an ineffective assistance claim based, in part, on his counsel's failure two move to quash the indictment. We stated:

> [i]f Morlett's counsel had made a timely motion to quash, the state would have been obligated to specifically plead the method of coercion used by Morlett to influence Herrera at the murder trial ... As the evidence at trial demonstrated that Morlett used threats to coerce Herrera to testify falsely, the State could simply have reindicted Morlett specifically alleging the coercion. Thus, even assuming counsel's performance was deficient in failing to move to quash, no prejudice has been shown.

Id. at 1525. Similarly, in this case, had Royal's counsel made the motions he now suggests, the Government would simply have made the indictment more specific.

Royal next points us to counsel's failure to object to

the court's jury charge. He attacks his counsel's performance with respect to these instructions for the same reasons he attacked the instructions directly. Having previously concluded that he was not prejudiced by the court's failure to include the instructions requiring unanimity and narrowing the applicable dates, we conclude that this indirect attack on the instructions also fails. The overwhelming evidence of the Defendant's guilt further supports our conclusion that he suffered no prejudice as a result of his counsel's performance. *See e.g., United States v. Oakley,* 827 F.2d 1023, 1026 (5th Cir.1987) (ineffective assistance claim fails, in part, becauses of overwhelming evidence against defendant).

VI.

For the reasons stated above, we affirm the Defendant's conviction and his sentence.

AFFIRMED.